

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)	In Proceedings
)	Under Chapter 7
JAMES KIEMEL,)	
)	No. BK 88-30393
Debtor(s))	
)	
BETTY MAYS,)	Adv. No. 92-3079
)	
Plaintiff,)	
)	
vs.)	
)	
JAMES KIEMEL,)	
)	
Defendant.)	
)	
ROBERT MAYS & BETTY MAYS))	Adv. No. 92-3036
)	
Plaintiffs,)	
)	
vs.)	
)	
JAMES KIEMEL,)	
)	
Defendant.)	

OPINION

Prior to seeking relief under the Bankruptcy Code, debtor operated a business known as Fast License Service Corporation in Fairmont City, Illinois. The corporation was responsible for, among other things, the collection of registration and license fees, which were then remitted to the Secretary of State. In order to operate this business, debtor was required by state law to obtain a remittance agent's bond in the amount of \$10,000.00. Transamerica Insurance Company, as surety, periodically issued the bonds, which were cosigned by debtor and attorney Robert Mays. Attorney Mays also executed various indemnity agreements, in which he agreed to indemnify

Transamerica

for any losses it might sustain as a result of having issued the bonds. The indemnity agreement dated October 21, 1985 was also signed by Betty Mays, Robert Mays's wife. In December 1987, Transamerica was notified by the Illinois Department of Revenue that debtor had issued a number of checks for insufficient funds. Apparently, debtor continued to issue checks for insufficient funds and/or failed to pay title, registration, and tax fees for a period of time thereafter. As a result, Transamerica was required to pay, and did in fact pay, \$9,615.48 to the State of Illinois during 1988. The following events ensued.

On May 13, 1988, attorney Robert Mays filed a chapter 13 petition on debtor's behalf and continued to represent debtor during the pendency of the chapter 13 proceeding. The petition was signed by both debtor and Mays. Transamerica was listed as an unsecured creditor, to the extent of \$1,077.00, in debtor's schedules.¹ However, neither Robert Mays nor Betty Mays were listed as cosignors on the debt owed Transamerica.²

In October 1988, with the consent of Robert Mays and Mary Kiemel, debtor's guardian, Donald Hoffman was substituted as the attorney of record for debtor. On November 17, 1988, debtor's chapter

¹Of the \$9,615.48 paid by Transamerica to the State of Illinois, \$7,203.98 was paid **after** debtor filed his chapter 13 case, but prior to conversion to a chapter 7.

²Question 13 on the Chapter 13 Statement asks, "Are any other persons liable, as cosignors, guarantors, or in any other manner, on any of the debts of either of you or is either of you so liable on the debts of others?" Debtor's response was "No."

13 case was converted to a chapter 7 proceeding. A notice scheduling the 341 meeting of creditors was mailed by the Clerk's office to all creditors on November 22, 1988. The notice also provided that all complaints objecting to discharge or dischargeability must be filed by February 13, 1989, and that all proofs of claim must be filed by March 13, 1989.³ On December 5, 1988, debtor filed amended schedules. Robert Mays was listed as an unsecured creditor to the extent of \$6,200.00 (apparently for some personal loans). Transamerica's debt was rescheduled in the amount of \$9,615.48, and Robert Mays was listed as a "codebtor" on the debt owed Transamerica--Betty Mays was not. On December 6, 1988, Robert Mays filed a proof of claim in the amount of \$6,200.00. The chapter 7 trustee subsequently filed a no asset report and an order of discharge was entered on April 11, 1989.

On or about February 11, 1991, Transamerica filed a suit in state court against Robert and Betty Mays seeking indemnification for the funds paid by Transamerica to the State of Illinois. Robert and Betty Mays then filed a third-party complaint against debtor, based on an implied contract of indemnity, requesting that debtor be ordered to indemnify them for any judgment awarded Transamerica. Transamerica's suit against Robert and Betty Mays, as well as the third-party

³Although Donald Hoffman had already been substituted as debtor's attorney, Robert Mays was listed as debtor's attorney on the 341 notice. The "certificate of service" stamped by the Clerk's office on the back of the notice indicates that it was mailed to "debtor's attorney." The Court therefore assumes that Robert Mays received a copy of this notice. This assumption, however, is not determinative of the Court's decision today since the evidence otherwise establishes that Mays had actual knowledge of debtor's chapter 7 proceeding.

complaint, are still pending in state court.

On February 26, 1992, debtor filed a motion to reopen his bankruptcy case to add Robert and Betty Mays as creditors. The Court allowed the motion over objections filed by the Mayses. On appeal, the District Court affirmed the Court's order allowing the case to be reopened. The matter was then appealed to the Seventh Circuit Court of Appeals--oral arguments have since been heard by that Court, but no decision has yet been rendered.

In the meantime, two adversary cases were filed. On April 20, 1992, Robert and Betty Mays filed a complaint under 11 U.S.C. § 523(a)(4) (Adversary No. 92-3036), alleging that debtor violated his fiduciary obligation to plaintiffs by failing to perform his duties as remittance agent in an honest, truthful and trustworthy manner, and that as a result, the debt owed by debtor to plaintiffs (for indemnification) is nondischargeable. Debtor has filed a motion for summary judgment, contending that the complaint was not timely filed, and further contending that Robert Mays had notice and knowledge of debtor's chapter 7 case in time to file a dischargeability complaint. Debtor's motion for summary judgment is directed to Robert Mays only.

On December 23, 1992, Betty Mays filed a complaint under 11 U.S.C. § 523(a)(3) (Adversary No. 92-3079), alleging that because she did not have notice or knowledge of debtor's bankruptcy case, the debt owed by debtor to her (for indemnification) is nondischargeable. Both parties have filed motions for summary judgment. The motions for summary judgment in each case are now before the Court for disposition.

Adversary No. 92-3036

Robert and Betty Mays have filed a complaint against debtor pursuant to section 523(a)(4) of the Bankruptcy Code.⁴ Debtor argues that the complaint is untimely. Section 523(c) provides that "the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) ... unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge.... 11 U.S.C. § 523(c). More importantly, complaints filed pursuant to any one of those subsections must be filed within the strict time limit established by Bankruptcy Rule 4007(c), which provides:

A complaint to determine the dischargeability of any debt pursuant to §523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to §341(a).... On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Bankr.R. 4007(c). The Court cannot extend the time within which a 523(c) complaint may be filed unless the motion for extension of time is filed before the original deadline has expired. See Bankr.R. 9006(b)(3).⁵

In the present case, the debt owed Robert and Betty Mays (based on their third-party complaint) was not listed in debtor's original

⁴Section 523(a)(4) provides that a debt is nondischargeable if obtained through "fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny." 11 U.S.C. § 523(a)(4).

⁵Rule 9006(b)(3) provides, "The court may enlarge the time for taking action under Rules ... 4007(c) ... only to the extent and under the conditions stated in those rules." Bankr.R. 9006(b)(3).

schedules nor in the amended schedules that were filed shortly after the case was converted to a chapter 7. Debtor, however, contends that under section 523(a)(3), Robert Mays had notice and knowledge of the chapter 7 proceeding in time to file a complaint objecting to dischargeability. Section 523(a)(3) provides, in relevant part:

(a) A discharge under section 727 ... does not discharge an individual debtor from any debt....

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit....

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request....

11 U.S.C. § 523(a)(3)(B). Clearly, Robert Mays had knowledge of debtor's chapter 7 proceeding in time to file a complaint under section 523 (a) (4)--his knowledge is evidenced by the proof of claim he filed on December 6, 1988, two months prior to the deadline for filing dischargeability complaints.⁶ In light of this fact, Mays cannot assert an objection to dischargeability of debt at this late date. He was required to file his complaint in a timely manner and failed to do so.

Nonetheless, Mays argues that the complaint is predicated on the amended statement of creditors filed April 13, 1992 in debtor's reopened bankruptcy case, and that the time period for filing

⁶Indeed, Robert Mays does not dispute that he had notice and knowledge of debtor's chapter 7 case.

dischargeability complaints was "reopened" or "extended" as to those newly listed creditors. His argument has no merit. Reopening a case to list a creditor does not extend the time to file complaints to determine dischargeability. Either the creditor had actual, timely notice of the [case] or he didn't. Amending the schedules will not change that." In re Mendiola, 99 B.R. 864, 868 (Bankr. N.D. Ill. 1989) (citing In re Karamitsos, 88 B.R. 122, 123 (Bankr. S.D. Tex. 1988)). See also In re Thibodeau, 136 B.R. 7, 9-10 (Bankr. D. Mass. 1992).

Any argument by Robert Mays that he was not required to file a complaint objecting to dischargeability until the "existence" of the debt became "known" is likewise without merit.⁷ Transamerica's debt was listed in debtor's chapter 13 schedules (which were prepared by Mays) and in debtor's chapter 7 schedules. Robert Mays was listed as a "codebtor" on this debt in the chapter 7 proceeding. He should have realized that debtor's liability to Transamerica would be discharged and that as a result, he would be liable for the entire indebtedness. See In re McCrady, 23 B.R. 193 (Bankr. W.D. Ky. 1982) (codebtor of bankruptcy petitioner, with actual notice of bankruptcy case and after discharge had been entered, could not sue debtor on their joint and several obligations). The actual knowledge of debtor's bankruptcy proceeding afforded Robert Mays an opportunity to establish the nondischargeability of the debt owed to him. He failed to act in a

⁷In this regard, Mays appears to argue that the debt owed by debtor to Robert and Betty Mays was "nonexistent" until such time as Transamerica's suit, and the resulting third-party complaint, were filed.

timely manner, and as a result, the debt, if any,⁸ was discharged in debtor's chapter 7 proceeding.

Debtor has not sought summary judgment with respect to Betty Mays in the instant adversary proceeding. Therefore, the Court reserves ruling on the merits of the complaint as to plaintiff Betty Mays.

Adversary No. 92-3079

Betty Mays has filed a complaint under section 523(a)(3), alleging that because she did not have notice or knowledge of debtor's bankruptcy case, the debt owed by debtor to her (for indemnification) is nondischargeable. Robert Mays, as attorney for his wife, filed a motion for summary judgment, contending that the debt owed Betty Mays was not listed by debtor in his schedules, and contending further that it is "an uncontroverted fact" that she did not have notice or knowledge of debtor's bankruptcy case in time to file a complaint objecting to dischargeability. Debtor has filed a cross motion for summary judgment. Debtor argues that a factual dispute exists with regard to the question of whether Betty Mays had notice or knowledge of debtor's case, and argues further that even if she did not have notice or knowledge, debtor is still entitled to summary judgment.

Betty Mays submitted an affidavit with her complaint in which she states that she did not learn of debtor's bankruptcy proceeding until debtor moved to reopen his case in February 1992. She made the same statement in a deposition on December 21, 1992. Debtor disputes her

⁸The third-party complaint filed by the Mayses against debtor is based on an implied contract of indemnity. The Court makes no determination, at this time, as to whether that theory is legally sound.

credibility, noting in particular that (1) she is married to attorney Robert Mays, who filed debtor's chapter 13 case; and (2) Robert Mays has represented his wife in matters related to the state court suit filed by Transamerica against the Mayses since February 1991.

The Court finds that a genuine issue of fact exists with regard to whether Betty Mays had notice or knowledge of debtor's bankruptcy case. That issue cannot be resolved without the presentation of further evidence, and without affording the Court an opportunity to observe the demeanor of the witnesses in order to evaluate their credibility. See Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2726 (questions of credibility may preclude the entry of summary judgment). Therefore, summary judgment is inappropriate at this time.⁹

Debtor contends that even assuming Betty Mays did not have the required notice or knowledge, summary judgment should be entered in his favor. Debtor apparently believes that because he later amended his schedules to include her as a creditor, the debt owed her is dischargeable. That assumption is incorrect. The creditor must still be given an opportunity to contest dischargeability under section 523(a)(3). See, e.g., In re Padilla, 84 B.R. 194 (Bankr. D. Colo. 1987).

⁹A finding that Betty Mays did not have notice or knowledge of debtor's bankruptcy case does not necessarily mean that the debt owed to her is nondischargeable. "Section 523(a)(3)(B) does not create a separate exception from discharge merely for the debtor's failure to schedule a creditor. Instead, the creditor must also have a cause of action under § 523(a)(2), (4), or (6). Mere allegations of a cause of action are not sufficient." In re Lochrie, 78 B.R. 257, 259 (Bankr. 9th Cir. 1987). See also In re Candelaria, 121 B.R. 140, 144 (E.D.N.Y. 1990).

Accordingly, for the reasons set forth above, IT IS ORDERED that the motion for summary judgment filed by debtor/defendant in adversary number 92-3036 is GRANTED as to Robert Mays. IT IS FURTHER ORDERED that the motion for summary judgment filed by plaintiff and the cross motion for summary judgment filed by debtor/defendant in adversary number 92-3079 are DENIED.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: April 6, 1993